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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Terrance Cornelis, et al.,

Plaintiffs,

v.

B&J Smith Associates LLC, et al.,

Defendants.

No. CV-13-00645-PHX-BSB

ORDER

Defendants B&J Smith Associates, Limited Partnership, B&J Smith Investments, Inc., an Arizona Corporation, Barry M. Smith, Julia P. Smith, and Lynette B. Walbom (Defendants) have filed a motion to dismiss the second amended complaint. (Doc. 34.) Plaintiffs Terrance and Yvonne Cornelis (Plaintiffs) oppose the motion. (Doc. 36.) For the reasons below, the Court grants Defendants' motion and dismisses this action.[1]

I. Background

On April 1, 2013, Plaintiffs filed their original complaint alleging violations of the Federal Trade Commission Act, common law fraud, violations of the Small Business Franchise Act, fraud in violation of the Arizona Consumer Fraud Act, a violation of the Uniform Fraudulent Transfer Act, and asserting a claim for "Declaratory Judgment."

[1] Defendants request oral argument on the motion. (Doc. 34.) Because the parties have sufficiently briefed the motion, oral argument is not necessary to resolve the pending motion and the Court denies Defendants' request. *See Mahon v. Credit Bur. of Placer County, Inc.*, 171 F.3d 1197,1200 (9th Cir. 1999) (explaining that if the parties provided the district court with complete memoranda of the law and evidence in support of their positions, ordinarily, oral argument is not required).

(Doc. 1.) On May 15, 2013, Defendants filed a motion to dismiss for failure to state a claim. (Doc. 10.) In response, Plaintiffs filed a first amended complaint and the Court denied Defendants' motion as moot. (Doc. 18.)

On July 13, 2013, Defendants filed a motion to dismiss the first amended complaint for failure to state a claim. (Doc. 19.) Plaintiffs then attempted to file another amended complaint. The Court ordered the Clerk of Court to strike that complaint because Plaintiffs had not complied with Federal Rule of Civil Procedure 15(a)(2). (Docs. 22-23.) On August 9, 2013, Plaintiffs filed a motion for leave to file a second amended complaint. (Doc. 26.) The Court granted, in part, and denied, in part, Plaintiffs' motion to amend, and denied Defendants' motion to dismiss the first amended complaint as moot. (Doc. 31.) On February 18, 2014, Plaintiffs filed a second amended complaint. (Doc. 32.)

II. Second Amended Complaint

The second amended complaint includes one count for breach of written contract (labeled Count I) and a section entitled "Alter Ego." (Doc. 32.) Plaintiffs' allegations in Count I arise from a restaurant franchise agreement (the Franchise Agreement) that they entered into with Eatza Pizza, Inc. (Eatza Pizza) on October 24, 2006.[2] (Doc. 32 at ¶ 13.) Plaintiffs assert that Eatza Pizza made misrepresentations in "the Franchise Offering Circular," including claims that Eatza Pizza (1) had developed a successful business plan, (2) had developed a distinctive restaurant design and food items, and (3) that its "restaurant system featured the highest standards of management training, supervision, merchandising, and quality food products." (*Id.* at ¶¶ 29-30.) The Franchise Offering

[2] After Plaintiffs filed the second amended complaint, they filed exhibits in support of that complaint. (Doc. 37.) Plaintiffs previously filed these same exhibits in support of their original complaint and a proposed second amended complaint. (Docs. 14, 24.) Although Plaintiffs should have attached these exhibits to their second amended complaint, their failure to do so does not appear to be in bad faith and permitting Plaintiffs to incorporate the exhibits into their second amended complaint will not prejudice Defendants who have previously seen these exhibits and have not objected to their authenticity. (Doc. 34 at 7-8; Doc. 38 at 3-4.) Accordingly, the Court considers the exhibits at docket 37 incorporated into the second amended complaint.

Circular allegedly induced Plaintiffs to pay $55,000.00 in franchise fees, lease business space, and prepare to open an Eatza Pizza restaurant. (*Id.* at ¶ 31.) Plaintiffs allegedly invested a total of $1,100,000.00. (*Id.*)

Plaintiffs assert that, pursuant to an asset purchase agreement dated March 2007, (Asset Purchase Agreement), B&J Smith Associates, LLC (B&J Smith Associates) and B&J Smith Investments, Inc. (B&J Smith Investments) sold Eatza Pizza to International Franchise Associates, Inc. (IFA). (Doc. 32 at ¶ 3.) Plaintiffs further allege that IFA filed for bankruptcy on August 4, 2008 and, thus, "IFA was an undercapitalized shell corporation formed to avoid its or [Eatza Pizza's] contractual obligations." (*Id.* at ¶¶ 3, 21.)

Plaintiffs allege that Eatza Pizza, and "subsequently IFA," did not provide them with training, support, or a viable business plan to help them develop a profitable restaurant and committed "other acts of bad faith." (*Id.* at ¶ 32.) Plaintiffs allege that because of Eatza Pizza's failure to comply with its franchisor obligations, they were forced to cease operating their Eatza Pizza restaurant. (*Id.* at ¶ 33.) Plaintiffs claim that they were not aware of the Asset Purchase Agreement until "[s]ometime [in] June 2008," when another Eatza Pizza franchise owner sent them a copy of that agreement. (*Id.* at ¶¶ 9, 19.)

Plaintiffs also allege that B&J Smith Associates and B&J Smith Investments owned Eatza Pizza. (*Id.* at ¶ 3.) They further allege that Lynette Walbom (Walbom), Barry M. Smith (Barry Smith), and Julia P. Smith (Julia Smith) were corporate officers of B&J Smith Associates and B&J Smith Investments (*Id.* at ¶ 2), and that Walbom and Barry Smith "were in complete and daily control of the direction and operation of Eatza Pizza, Inc." (*Id.* at 41.)

III. Subject Matter Jurisdiction

The second amended complaint alleges state law violations and invokes this Court's diversity jurisdiction pursuant to 28 U.S.C. § 1332. District courts have diversity jurisdiction over civil actions when there is complete diversity between the parties and

the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332(a). For purposes of determining diversity jurisdiction, an individual person is deemed a citizen of the state in which he is domiciled. *Lew v. Moss*, 797 F.2d 747, 749 (9th Cir. 1986). A corporation is deemed a citizen of every state in which it has been incorporated and of the state in which it has its principal place of business. *See* 28 U.S.C. § 1332(c)(1); *Hertz Corp. v. Friend*, 559 U.S. 77, 80-81 (2010) (a complaint must allege both the corporation's state of incorporation and location of the principal place of business, which is its "nerve center."). Partnerships and limited liability companies (LLC) are citizens of every state in which their owners or members are citizens. *See Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006). At the pleading stage, a party seeking to invoke diversity jurisdiction should affirmatively allege, but need not prove, the actual citizenship of the parties. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001) ("[I]n a diversity action, the plaintiff must state all parties' citizenships such that the existence of complete diversity can be confirmed.") (citation omitted).

Here, Plaintiffs have filed the second amended complaint from a North Carolina address and allege that they are "citizens residing in" North Carolina.[3] (Doc. 32.) Plaintiffs also allege that B&J Smith Investments, identified by Plaintiffs and Defendants as a corporation, is an Arizona corporation with its principal place of business in Arizona. (Doc. 32 at ¶2.) Plaintiffs further allege that "B&J Smith Investments, LLC" is an "Arizona corporation." (*Id.*) However, Defendants identify that entity as a limited partnership and the Court assumes that Defendants' designation of B&J Smith Associates as a limited partnership is correct. A complaint "must expressly identify each member of any limited partnership, and/or limited liability companies, along with each member's citizenship. Such jurisdictional allegations are necessary for [the] Court to conclude

[3] "Diversity jurisdiction is based on *citizenship*, not residency." *Kalinowski v. Davol, Inc.*, 2006 WL 2615894, at *2 (D. Ariz. Sept. 11, 2006) (emphasis in original). However, liberally construed, the second amended complaint alleges that Plaintiffs are citizens of North Carolina.

whether diversity jurisdiction is satisfied." *Liberty Propane, LP v. Feheley*, 2006 WL 2553396, at *1 n.1 (D. Ariz. Aug. 29, 2006).

The second amended complaint does not identify each member of B&J Smith Associates and does not identify each member's citizenship. The second amended complaint also fails to allege the citizenship of individual Defendants Barry Smith, Julia Smith, and Walbom. Accordingly, Plaintiffs have failed to satisfy the minimum diversity requirements of § 1332(a)(1). Although Plaintiffs could possibly cure these defects, the Court will not give Plaintiffs an opportunity to file another amended complaint because even if the jurisdictional defects were cured, their claims against Defendants are subject to dismissal for the additional reasons set forth below.

IV. Rule 12(b)(6) — Dismissal for Failure to State a Claim

The Federal Rules of Civil Procedure require "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also* Fed. R. Civ. P. 8(a)(2). Thus, dismissal for insufficiency of a complaint is proper if the complaint fails to state a claim on its face. *Lucas v. Bechtel Corp.*, 633 F.2d 757, 759 (9th Cir. 1980); *see also* Fed. R. Civ. P. 12(b)(6). Although a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted).

A Rule 12(b)(6) dismissal for failure to state a claim can be based on either (1) the lack of a cognizable legal claim, or (2) insufficient facts to support a cognizable legal claim. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). When considering a motion to dismiss, the court takes all allegations of material fact as true and construes them in the light most favorable to the non-moving party. *Clegg v. Cult Awareness*

Network, 18 F.3d 752, 754 (9th Cir. 1994). "[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). In other words, the complaint must contain enough factual content "to raise a reasonable expectation that discovery will reveal evidence" of the claim. *Twombly*, 550 U.S. at 556.

V. Plaintiffs' Claims

Plaintiffs identify "Count I" of the second amended complaint as asserting a claim for breach of contract, but they allege several theories of recovery within that count, including: (1) violations of the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45(a)(1) (Doc. 32 at ¶¶ 41, 45); (2) common law fraud, fraudulent misrepresentation, and a violation of the Arizona Consumer Fraud Act (Doc. 32 at ¶¶ 42, 43, 44, 47); and (3) breach of contract (the Franchise Agreement). (Doc. 32 at ¶¶ 12, 46.) The second amended complaint further alleges that, although Defendants were not parties to the Franchise Agreement, they are liable for the alleged breach of that contract under the alter ego doctrine.[4] (Doc. 12.)

In their motion to dismiss, Defendants argue the claims asserted in the second amended complaint are based on a statute that does not create a private cause of action (violations of the FTCA), are time barred (fraud-related claims), or do not allege

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[4] Count I of the second amended complaint also alleges "acts of bad faith" and "incapacity to lawfully enter into a contract for purposes of establishing a franchise relationship." (Doc. 32 at ¶ 46.) The aggregation of multiple legal theories into one count does not satisfy the pleading standards of Rule 8. *See Juniel v. Lab. Corp. of Am.*, 2013 WL 2297180, at *3 (D. Ariz. May 24, 2013) (a complaint consisting of a "lengthy, disjointed paragraphs that do not clearly set forth [p]laintiff's separate causes of action," does not satisfy Rule 8(a)(2)). Moreover, these allegations are conclusory and the factual elements supporting them are not organized in "a short and plain statement of the claim." *See* Fed. R. Civ. P. 8(a). "A complaint having the factual elements of the cause of action present, but scattered throughout the complaint and not organized into a 'short and plain statement of the claim' may be dismissed for failure to satisfy Rule 8(a)." *Henkels v. J.P. Morgan Chase*, 2011 WL 2357874, at *2 (D. Ariz. Jun. 14, 2011) (citing *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640 (9th Cir. 1988)).

sufficient facts to state a claim for relief (breach of contract liability based on the alter ego doctrine). (Doc. 34.) As set forth below, the Court agrees and grants Defendants' motion to dismiss the second amended complaint for failure to state a claim.

A. Claims under the Federal Trade Commission Act

Plaintiffs allege that Barry Smith, Lynette Walbom, and B&J Smith Investments, through their general partner B&J Smith Associates "while in total control of Eatza Pizza has engaged in deceptive acts and practices, including selling [Plaintiffs] a franchise when, by their own admission in the Asset Purchase Agreement, they were not in compliance with the Federal Trade Commission Rules and Regulations." (Doc. 32 at ¶ 41.) Plaintiffs assert that this conduct, and Defendants' failure "to provide disclosure of material changes and mispresent[ation] of material facts pertinent to the operation of an Eatza Pizza restaurant," establish a violation of Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). (*Id.* at ¶¶ 41, 45.)

The FTCA prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). The FTCA vests remedial power solely in the Federal Trade Commission and does not grant a private cause of action. *See* 15 U.S.C. § 45(a)(2); *see also Dreisbach v. Murphy*, 658 F.2d 720, 730 (9th Cir. 1981) (finding that "private litigants may not invoke the jurisdiction of the federal district courts by alleging that defendants engaged in business practices proscribed by § 5(a)(1)."); *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973) ("The protection against unfair trade practices afforded by the Act vests initial remedial power solely in the Federal Trade Commission"); *Diessner v. Mortg. Elec. Registration Sys.*, 618 F. Supp. 2d 1184, 1191 (D. Ariz. 2009) (dismissing claims under the FTCA stating that "there is no private right of action under the FTCA."). Accordingly, Plaintiffs cannot assert a cause of action for a violation of the FTCA and the Court dismisses the FTCA claim. *See Sakugawa v. IndyMac Bank, F.S.B.*, 2010 WL 4909574, at *5 (D. Haw. Nov. 24, 2010) (noting that the FTCA does not create a private right of action and dismissing FTCA claim without leave to amend).

B. Fraud−Related Claims

In Count I, Plaintiffs also assert several fraud-related claims against Defendants. Plaintiffs assert that Barry Smith and Walbom committed "contract fraud" by using Steve Belden, the CEO of Eatza Pizza, to sign the Franchise Agreement on their behalf. (Doc. 32 at ¶ 42.) Plaintiffs further allege that "[t]he individual Defendants and corporate Defendants" employed "a scheme and artifice to defraud" Plaintiffs and intentionally omitted material facts from the October 11, 2006 Franchise Offering Circular including the "seller's intention to sell certain of its assets, changes in litigation, locations owned, changes in franchisees, or changes in financial position of seller." (Doc. 32 at ¶ 43.)

Plaintiffs also allege that the "individual Defendants along with the corporate Defendants . . . misrepresented material facts in the March 28, 2005 through October 11, 2006 Franchise Offering Circular," including the "cost of opening and developing an Eatza Pizza restaurant, cost of first year operating and advertising expenses," and "[c]laims to have distinctive and identifying recipes, food preparation methods, and food products . . . ." (*Id.* at ¶ 44.) Plaintiffs assert that these deceptive practices constituted fraud and violated the Arizona Consumer Fraud Act. (Doc. 32 at ¶ 47.)

1. Common Law Fraud and Fraudulent Misrepresentation

To the extent that Plaintiffs allege common law fraud and fraudulent misrepresentation, those claims are time barred because such claims must be filed "within three years after the cause of action accrues." *See* Ariz. Rev. Stat. § 12-543(3);[5] *Serrano v. Serrano*, 2012 WL 75639, at *3 (Ariz. Ct. App. Jan. 10, 2012) (stating that, under Arizona law, the statute of limitations for "fraudulent conveyance, fraudulent concealment, fraudulent misrepresentation, and aiding and abetting fraud is three years."). The cause of action accrues upon "the discovery by the aggrieved party of the

[5] Section 12-543(3) provides that "[t]here shall be commenced and prosecuted within three years after the cause of action accrues, and not afterward, the following actions . . . [f]or relief on the ground of fraud or mistake, which cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

facts constituting the fraud or mistake." Ariz. Rev. Stat. § 12-543(3); *see Transamerica Ins. Co. v. Trout*, 701 P.2d 851, 854 (Ariz. Ct. App. 1985) (stating that "[t]he discovery dates from the time that [the party], by exercise of reasonable diligence, might have discovered the fraud.").

Plaintiffs do not specifically allege when they discovered, or might have discovered, the facts constituting the fraud. Rather, the second amended complaint states that "[s]ometime [in] June 2008," another Eatza Pizza franchise owner sent Plaintiffs a copy of the Asset Purchase Agreement between Barry Smith, Walbom, and IFA. (Doc. 32 at ¶ 19.) In the response to the motion to dismiss, Plaintiffs assert that the Asset Purchase Agreement "proved to the Plaintiff[s] what they suspected up till (sic) then." (Doc. 36 at 2.) Because Plaintiffs do not allege when they discovered the facts that made them "suspect" that Defendants had engaged in fraudulent activity, the Court cannot identify the precise date upon which Plaintiffs' cause of action accrued. However, even assuming that Plaintiffs did not discover the alleged fraud, or facts giving rise to the alleged fraud, until June 30, 2008, their common law fraud and fraudulent misrepresentation claims are time barred because Plaintiffs did not commence the pending litigation until April 1, 2013 (Doc. 1), well after the expiration of the three-year statute of limitations. Accordingly, the Court dismisses Plaintiffs' common law fraud and fraudulent misrepresentation claims as time barred.

2. Arizona Consumer Fraud Act

Plaintiffs also assert that Defendants violated the Arizona Consumer Fraud Act (Doc. 32 at ¶ 47), which prohibits any "deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely on such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise . . . ." Ariz. Rev. Stat. § 44-1522(A). "The elements of a private cause of action under the act are a false promise or misrepresentation made in connection with the

sale or advertisement of merchandise and the hearer's consequent and proximate injury." *Dunlap v. Jimmy GMC of Tucson*, 666 P.2d 83, 87 (Ariz. Ct. App. 1983).

Because "[a] consumer fraud claim is created by statute . . . a consumer fraud action must be initiated within one year after the cause of action accrues." *Alaface v. Nat'l Inv. Co.*, 892 P.2d 1375, 1379 (Ariz. Ct. App. 1994); *see* Ariz. Rev. Stat. § 12-541(5). A cause of action for consumer fraud accrues "when the defrauded party discovers or with reasonable diligence could have discovered the fraud." *Alaface*, 892 P.2d at 1379 (internal citations omitted). Here, Plaintiffs appear to allege that they discovered the alleged fraud in June 2008. (Doc. 32 at ¶19; Doc. 36 at 2.) Even assuming that Plaintiffs discovered the fraud, or the facts giving rise to the fraud, on June 30, 2008, their consumer fraud claim is time barred because this action was initiated in 2013, well after the one-year limitations period expired. Accordingly, the Court dismisses Plaintiffs' consumer fraud claim. *See Higton v. Quicken Loans, Inc.*, 2011WL 333357, at *3 (D. Ariz. Jan. 31, 2011) (dismissing Arizona consumer fraud claim as time barred).

C. Breach of Contract/Breach of the Franchise Agreement

Finally, Plaintiffs allege that B&J Smith Investments, through its subsidiaries, failed to disclose and misrepresented material facts pertinent to operating an Eatza Pizza restaurant, which constituted a breach of the Franchise Agreement and, thus, Plaintiffs are entitled to damages under Ariz. Rev. Stat. § 12-548. (Doc. 32 at ¶ 46.) Plaintiffs further allege that Defendants breached the Franchise Agreement by failing "to provide a comprehensive system" for operating the franchise, failing "to provide adequate and valuable expertise in running the franchise," and failing "to provide adequate design services for the site." (Doc. 32 at ¶ 48.)

1. Statute of Limitations

In their previous motion to dismiss, Defendants argued that Plaintiffs' breach of contract claim was barred by the statute of limitations and that it would be futile to allow Plaintiffs to amend their complaint. (Doc. 19 at 4-5.) In its December 20, 2013 Order,

the Court rejected Defendants' argument because it did not appear "beyond a doubt" that Plaintiffs could "prove no set of facts that would establish the timeliness of the [breach of contract] claim." (Doc. 29 at 10 (quoting *Hernandez v. City of El Monte*, 138 F.3d 393, 402 (9th Cir. 1998).) Therefore, the Court granted Plaintiffs leave to file another second amended complaint and advised Plaintiffs that the amended complaint "must identify the conduct that constituted the alleged breach of the Franchise Agreement, the date on which that conduct occurred, or the date on which they discovered, through the exercise of due diligence, that such conduct had occurred." (Doc. 29 at 11.)

In the pending motion to dismiss, Defendants argue that Plaintiffs did not adequately allege "when the conduct that gave rise to the action occurred" or "was discovered" and, therefore, the breach of contract claim is barred by the statute of limitations. (Doc. 34 at 6.) Defendants further argue that Plaintiffs cannot rely on the discovery rule because they have not "plead that it was through a certain alleged event that the cause action was discovered." (Doc. 38 at 2.)

The statute of limitations defense may be raised by a motion to dismiss if the running of the statute is apparent on the face of the complaint. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir.1980). However, even if the relevant dates alleged in the complaint are beyond the limitations period, the "'complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim.'" *Hernandez*, 138 F.3d at 402 (quoting *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995)). Indeed, "[d]ismissal on statute of limitations grounds can be granted pursuant to Fed. R. Civ. P. 12(b)(6) 'only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.'" *Two Rivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (quoting *Vaughan v. Grijalva*, 927 F.2d 476, 478 (9th Cir. 1991)).

In Arizona, the statute of limitations for the breach of a written contract is six years. Ariz. Rev. Stat. § 12-548. Under the discovery rule, a cause of action does not accrue until the plaintiff knows or with reasonable diligence should have known the facts

underlying the cause. *Doe v. Roe*, 955 P.2d 951, 960 (Ariz. 1998.) Here, Plaintiffs allege that they entered into the Franchise Agreement on October 24, 2006 and that Eatza Pizza subsequently breached that agreement. (Doc. 32 at ¶¶10, 46-48.) Liberally construing the second amended complaint, Plaintiffs allege that they discovered the breach sometime in June 2008 when they received a copy of an Asset Purchase Agreement between Barry Smith, Walbom, and IFA.[6] (Doc. 32 at ¶ 19.)

In opposition to the motion to dismiss, Plaintiffs state that the Asset Purchase Agreement "proved to the Plaintiff[s] what they suspected up till (sic) then." (Doc. 36 at 2.) This statement suggests that Plaintiffs were aware of the facts giving rise to the breach of the Franchise Agreement sometime before June 2008. Although Plaintiffs did not comply with the Court's December 20, 2013 directive that they identify the date on which the conduct allegedly constituting the breach occurred, or the date on which they discovered such conduct (Doc. 29 at 10-11), because it does not appear "beyond [a] doubt that the plaintiff[s] can prove no set of facts that would establish the timeliness of the claim," the Court denies Defendants' motion to dismiss the breach of contract claim on statute of limitations grounds. *See Hernandez*, 138 F.3d at 402.

2. Plaintiffs' Claims Against the Business Entity Defendants

"For a plaintiff to bring a breach of contract action against a defendant, the plaintiff and defendant must have a contractual relationship." *Brown v. Kinross Gold U.S.A., Inc*., 531 F. Supp. 2d 1234, 1240 (D. Nev. 2008). Therefore, it "is axiomatic that non-parties cannot be held liable for breach of contract[.]" *Herbal Care Sys., Inc. v. Plaza*, 2009 WL 692338, at *2 (D. Ariz. Mar. 17, 2009); *see Pimal Property, Inc. v. Capital Ins. Group, Inc*., 2012 WL 608392, at *3 (D. Ariz. Feb. 27, 2012) (dismissing breach of contract claim for lack of privity when defendant was not a party to the contract at issue); *Samuel v. Allstate Ins. Co.*, 19 P.3d 621, 625 (Ariz. Ct. App. 2001), *vacated on*

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[6] If Plaintiff discovered the alleged breach of the Franchise Agreement in June 2008, their claim is timely because they filed their original complaint on April 1, 2013 (Doc. 1), well within the six-year limitations period.

other grounds by Samsel v. Allstate Ins. Co., 59 P.3d 281 (Ariz. 2002) ("Privity is that connection or relationship which exists between two or more contracting parties. It arises from the mere fact of entering into a contract. Generally, privity of contract must exist before one may seek to enforce or defeat the contract."); *Kelly v. Tillotson Pearson, Inc.*, 840 F. Supp. 935, 944 (D.R.I. 1994) (stating that "an action for breach of contract will not lie against non-parties to the contract.").

The Franchise Agreement at issue is between Plaintiffs and Eatza Pizza. (Doc. 32 at ¶ 4; Doc. 37 at 10, 48-49.) In its December 20, 2013 Order, the Court found that liberally construing the proposed second amended complaint, Plaintiffs appeared to allege that although B&J Smith Associates and B&J Smith Investments (the Business Entity Defendants) were not parties to the Franchise Agreement, they were liable for Eatza Pizza's alleged breach of Franchise Agreement under an alter ego theory of liability. (Doc. 29 at 5.) However, because Plaintiffs made only conclusory statements regarding an alter ego theory of liability, the proposed second amended complaint did not include sufficient allegations to state a claim against the Business Entity Defendants. (Doc. 29 at 7.) Because Plaintiffs could possibly cure those deficiencies, the Court granted Plaintiffs leave to file a second amended complaint to cure the deficiencies noted in the Order. (*Id.*) Defendants argue that Plaintiffs' second amended complaint does not cure those deficiencies and that it fails to set forth specific facts that state a claim of alter ego liability against B&J Smith Associates and B&J Smith Investments. (Doc. 34 at 6.)

Because this is a diversity case, the court applies state law to determine alter ego liability. *See Hambleton Bros. Lumber Co. v. Balkin Enters.*, 397 F.3d 1217, 1227 (9th Cir. 2005) (noting that in diversity actions, federal courts must apply state law when evaluating alter ego status); *see also Davis v. Metro Prods. Inc.*, 885 F.2d 515, 520-21 (9th Cir. 1989) (sitting in diversity and applying Arizona's test for piercing the corporate veil). Arizona law recognizes a presumption of corporate separateness under which a parent corporation is not liable for the actions of a subsidiary. *Deutsche Credit Corp. v. Case Power & Equip. Co.*, 876 P.2d 1190, 1195 (Ariz. Ct. App. 1994). However, the

alter ego theory allows a parent corporation to be held liable for the acts of its subsidiary when the individuality or separateness of the subsidiary corporation has ceased. *See Gatecliff v. Great Republic Life Ins. Co*., 821 P.2d 725, 728 (Ariz. 1991). "An alter ego or agency relationship is typified by parental control of the subsidiary's internal affairs or daily operations." *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001) (citing *Kramer Motors, Inc. v. British Leyland, Ltd*., 628 F.2d 1175, 1177 (9th Cir. 1980)).

To establish an alter ego theory of liability a plaintiff must prove both (1) unity of control and (2) that observance of the corporate form would sanction a fraud or promote injustice. *Doe*, 248 F.3d at 926 (citing *Dietel v. Day*, 492 P.2d 455, 457 (Ariz. Ct. App. 1972)). Unity of control is shown when a parent exercises "substantially total control over the management and activities" of its subsidiary. *Gatecliff*, 821 P.2d at 728 (internal citations and quotations omitted). A plaintiff may establish that a parent has substantially total control, "by showing, among other things: stock ownership by the parent; common officers or directors; financing of subsidiary by the parent; payment of salaries and other expenses of subsidiary by the parent; failure of subsidiary to maintain formalities of separate corporate existence; similarity of logo; and plaintiff's lack of knowledge of subsidiary's separate corporate existence." *Id.* Isolated occurrences of some of these factors are not enough to establish a alter ego liability. *See Patterson v. Home Depot, USA, Inc*., 684 F. Supp. 2d 1170, 1177-79 (D. Ariz. 2010). As the Court previously advised Plaintiffs, when alleging alter ego liability, "'the plaintiff must allege specific facts supporting application of the alter ego doctrine.'" (Doc. 29 at 6-7 (citing *Barba v. Seung Heun Lee*, 2009 WL 8747368, at *4 (D. Ariz. Nov. 4, 2009).)

The second amended complaint alleges that B&J Smith Associates and B&J Smith Investments "own Eatza Pizza" and that they were in "total control of Eatza Pizza." (Doc. 32 ¶¶ 3, 10, 41, 43.) Although "[a]lter ego determinations are highly fact-based," *Legacy Wireless Servs., Inc. v. Human Capital, L.L.C.*, 314 F. Supp. 2d 1045 (D. Or. 2004), "[c]onclusory allegations of 'alter ego' status are insufficient to state a claim" because "a plaintiff must allege specifically [the facts and elements of an alter ego

claim]." *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1116 (C.D. Cal. 2003); *see also Twombly*, 550 U.S. at 555 (requiring more than "labels and conclusions" to survive a motion to dismiss). Accordingly, these conclusory allegations are not sufficient to state a claim for alter ego liability.

In a section labeled "Alter Ego," the second amended complaint further alleges that the "corporate defendants secretly negotiated settlements of debt for pennies on the dollar through separate [counsel] other than through [Eatza Pizza] to maintain secrecy" (Doc. 32 at ¶ 53), that the "corporate Defendants" "gave Stanley Wolfson all equipment listed in Schedule 3 and 4 of the Asset Purchase Agreement" (Doc. 32 at ¶ 56), and that they disposed of "all of the office furniture along with all of the office equipment located at [Eatza Pizza] corporate offices" in Scottsdale "for their own benefit." (*Id.* at ¶ 57.) These allegations are also insufficient to state a claim for relief against B&J Smith Associates and B&J Smith Investments under an alter ego theory of liability.

Although Plaintiffs apparently include B&J Smith Associates and B&J Smith Investments under the collective term "corporate defendants," they failed to set forth facts regarding each separate entity's relationship with Eatza Pizza and how each separate entity exercised substantially total control over the management and activities of Eatza Pizza. *See Gatecliff*, 821 P.2d at 728 (discussing factors relevant to alter ego determination); *U-Haul Int'l Inc. v. Nat'l Union Fire Ins. Co.*, 2011 WL 9111, at *4 (D. Ariz. Jan. 3, 2011) (finding that plaintiffs' allegations were insufficient to state a claim under any applicable theory of parent corporation liability when complaint did not allege that AIG "marketed or administered the Plaintiffs' policy, collected premiums, or participated in the claim decisions that led to [the] lawsuit."); *but see Pimal Property*, 2012 WL 608392, at *5 (denying motion to dismiss alter ego claim when complaint alleged that "CIG [was] actively involved in Defendants' overall claims process, manages that process, sets claims handling goals and objectives by implementing rules, policies, and procedures" and defendants shared the same CEO, contact information, and

letterhead, and "CIG substantially control[led] the operations of and finances of Eagle West and CCIC.").

In addition, the second amended complaint does not allege common officers or directors, payment of Eatza Pizza's expenses by B&J Smith Investments or B&J Smith Associates, or the failure of Eatza Pizza to maintain formalities of separate corporate existence. *See Gatecliff*, 821 P.2d at 728; *Bus. Buyers Directory, LLC v. NW Capital*, 2009 WL 1698917, at *3 (D. Ariz. Jun. 16, 2009) (dismissing claims based on alter ego theory when complaint alleged facts showing some connection between two companies but did not discuss factors relevant to alter ego liability).

Because the Court has already given Plaintiffs an opportunity to amend their complaint to allege sufficient facts to state a claim against B&J Smith Investments and B&J Smith Associates under an alter ego theory of liability, the Court will not permit further amendment and will dismiss Plaintiffs' claims against B&J Smith Associates and B&J Smith Investments.

3. Plaintiffs' Claims against the Individual Defendants

As set forth above, the Franchise Agreement at issue is between Plaintiffs and Eatza Pizza. (Doc. 32 at ¶ 4; Doc. 37 at 10, 48-49.) Plaintiffs do not argue that Barry Smith, Julia Smith, or Walbom (the Individual Defendants) were parties to the Franchise Agreement (Doc. 32), and non-parties cannot be held liable for breach of contract. *Herbal Care Sys.*, 2009 WL 692338, at *2. However, in its December 20, 2013 Order, the Court found that liberally construing the proposed second amended complaint, Plaintiffs appeared to allege that although the Individual Defendants were not parties to the Franchise Agreement, they are liable for Eatza Pizza's alleged breach of Franchise Agreement under an alter ego theory of liability. (Doc. 29 at 8)

However, because Plaintiffs made only conclusory statements regarding such a theory of liability, the proposed second amended complaint did not include sufficient allegations to state a claim against the Individual Defendants. (Doc. 29 at 8-9.) Because Plaintiffs could possibly cure those deficiencies, the Court granted Plaintiffs leave to file

a second amended complaint to cure the deficiencies noted in the Order. (*Id.* at 9) Defendants argue that Plaintiffs' second amended complaint does not cure those deficiencies and that the second amended complaint fails to set forth specific facts that state a claim based on alter ego liability against the Individual Defendants. (Doc. 34 at 6.)

The second amended complaint does not clearly allege that Eatza Pizza is the alter ego of Barry Smith, Julia Smith, or Walbom. (Doc. 32.) However, in the section labelled "Alter Ego," Plaintiffs include several allegations that can be construed as claiming that Eatza Pizza is the alter ego of the Individual Defendants.[7] (Doc. 32 at 12.) Specifically, Plaintiffs allege that "individual Smith" "fire[d] the then named CEO of Eatza Pizza, Inc. and the[n] subsequently asked Steve Belden to take the position." (Doc. 32 at ¶ 51.) The second amended complaint also alleges that Belden, in his capacity as Eatza Pizza's CEO, was under the "direct control of the individual Defendants" and "was summarily discharged . . . with all of the remaining staff before Christmas 2006." (*Id.* at ¶ 52.)

This section of the second amended complaint also includes the Individual Defendants with the Business Entity Defendants in the allegations that Defendants "secretly negotiated settlements of debt for pennies on the dollar through separate [counsel] than through EP in order to maintain secrecy" (*Id.* at ¶ 53), "g[a]ve Stanley Wolfson all of the equipment listed in Schedule 3 and 4 of the Asset purchase agreement without compensation," and that the "dispose[d] of all of the furniture along with all of the office equipment located at EP corporate offices . . . for their own benefit and pleasure." (*Id.* at ¶ 57.)

The second amended complaint uses the phrase "individual Defendants" apparently to refer to Barry Smith, Julia Smith, and Walbom. Plaintiffs fail to set forth specific facts regarding each individual Defendant's relationship with Eatza Pizza. *See U-Haul*, 2011 WL 9111, at *4 (finding that complaint failed to state a claim when it

[7] The standards to establish alter ego liability under Arizona law are set forth above in Section V(C)(2).

"failed to set forth facts regarding [defendant's] alleged role in any of the alleged activity."). For example, Plaintiffs do not allege that Barry Smith, Julia Smith, or Walbom commingled personal and corporate funds or diverted company property for personal use. *See Activator Methods Int'l, Ltd. v. Future Health, Inc.*, 2012 WL 715629, at *3 (D. Ariz. Mar. 6, 2012) (collecting cases stating that corporation was not an alter ego of an owner absent evidence of commingling of funds or abuse of corporate structure for improper purposes).

Additionally, Plaintiffs do not allege that Barry Smith, Julia Smith, or Walbom were "officers, directors, or shareholders" of Eatza Pizza. *But see Activator Methods*, 2012 WL 715629, at *4 (finding allegations in the complaint that individual defendant owned corporation, usurped corporate assets, and negotiated and signed the partnership agreement at issue in the complaint were sufficient to show unity of control for purposes of stating a claim under the alter ego theory); *Leo Eisenberg & Co.*, 785 P.2d at 54 (stating that "the doctrine of 'piercing the corporate veil' applies only to plaintiff who seek recovery against the personal assets of corporate shareholders or directors."). Thus, the second amended complaint does not sufficiently allege that Eatza Pizza was the alter ego of Barry Smith, Julia Smith, or Walbom.

The "Alter Ego" section of the second amended complaint also alleges that the "individual Defendants are the sole officers and shareholders of the corporate Defendants" and that they "absolutely controlled and dominated the corporate Defendants." (Doc. 32 at ¶ 50.) Plaintiffs further allege that "individual Defendants have misused their absolute control and domination of the corporate Defendants." (*Id.* at ¶ 61.) Finally, Plaintiffs allege that the "individual Defendant" "abused the corporate privilege with respect to the corporate defendants" by treating the assets of the "corporate Defendant" as their own; inadequately capitalizing the "corporate Defendant"; failing to reflect the corporate status of the "corporate Defendant" in communications, or purchase and sale documents, diverted corporate assets of the "corporate Defendant"; "treatment by the individual Defendant of assets of the corporate Defendant as his own"; failing to

keep corporate records; and using the "corporate Defendant as a subterfuge for illegal transactions masterminded by the individual Defendants." (Doc. 32 at ¶ 62.)

Because the second amended complaint names three individual and two business entity defendants and includes allegations against another corporate entity, Eatza Pizza, Plaintiffs' use of the terms "individual Defendant," "individual Defendants," "corporate Defendants," and "corporate Defendant," as cited above, is confusing. It is not clear whether Plaintiffs are alleging that B&J Smith Investments was the alter ego of Barry Smith, Julia Smith, or Walbom, that B&J Smith Associates was the alter ego of Barry Smith, Julia Smith, or Walbom, or whether they meant to allege that Eatza Pizza was the alter ego of Barry Smith, Julia Smith, or Walbom.

When pleading alter ego liability, a plaintiff must allege specific facts in support of that theory. *See Barba*, 2009 WL 8747368, at *4. By failing to specifically identify which Individual Defendant took what action with regard to which Business Entity Defendant, or with regard to Eatza Pizza, Plaintiffs falls short of this requirement. *See Fromkin v. IndyMac Bank FSB*, 2010 WL 2541167, at *3 (D. Ariz. Jun. 18, 2010) (finding plaintiff's "fail[ure] to specifically identify which Defendants he is asserting [his] claim against" and failure to "articulate facts supporting" his claims did not satisfy the requirements of *Twombly* and *Iqbal*).

As set forth above, the second amended complaint recites several relevant factors for determining whether there is an alter ego relationship between an individual and a corporation, but does not include any specific facts supporting the application of the alter ego doctrine in this particular case. (Doc. 32 at ¶ 62.) Without such factual allegations, the issue of alter ego, or veil piercing, is not sufficiently pleaded. *See Twombly*, 550 U.S. at 555 ("[a] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."); *Iqbal*, 556 U.S. at 678 ("[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the assumption of truth); *M&I Marshall & Ilsley Bank v. Lerner*, 2010 WL 5232970, at

*3 (D. Ariz. Dec. 16, 2010) (dismissing claims that were "legal conclusions couched as factual allegations"); *Skydive Ariz., Inc. v. Quattrochi*, 2006 WL 2460595, at *7-8 (D. Ariz. Aug. 22, 2006) (finding that the plaintiff failed to state a claim against the defendants where complaint alleged the alter ego theory with no factual basis). Because Plaintiffs have not alleged sufficient facts to support an alter ego claim against the Individual Defendants, the Court dismisses Plaintiffs' claims against those Defendants.

VI. Conclusion

The Court grants Defendants' motion and dismisses this action. Since commencing this action on April 1, 2013, Plaintiffs have amended, or attempted to amend, their complaint several times to cure pleading deficiencies and in reaction to Defendants' motions to dismiss. (Docs. 10, 15, 19, 22, 26.) Because Plaintiffs have had sufficient opportunity to amend their complaint, including in response to the Court's December 20, 2013 Order, the Court declines to give them a further opportunity to do so.

Accordingly,

IT IS ORDERED that that Defendants' Motion to Dismiss (Doc. 34) is **GRANTED** and that the Second Amended Complaint (Doc. 32) is dismissed. The Clerk of Court shall terminate this action.

Dated this 8th day of May, 2014.

Bridget S. Bade
United States Magistrate Judge